Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

MILTON SONNEBERG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a duty of disclosure is an element of the federal mail and wire fraud statutes.

2. Whether a court — interpreting the federal mail and wire fraud statutes — commits reversible error when it holds that "both before and after the Neder decision, duty to disclose is not a required element of the common-law fraud offenses when there have been material non-disclosures."

3. Whether a court's refusal to instruct the jury on the duty of disclosure in a mail and wire fraud case may ever constitute harmless error.

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Appendix C — Order Of The United States Court Of Appeals For The Third Circuit Denying Petition For Rehearing Dated July 14, 2003 ..... 25a

Petitioner Milton Sonneberg respectfully requests that a writ of certiorari be issued to review a decision of the United States Court of Appeals for the Third Circuit, entered on April 4, 2003, which affirmed the United States District Court's denial of Petitioner's Motion pursuant to 28 U.S.C. § 2255.

OPINIONS BELOW

On April 6, 2001, the United States District Court for the District of New Jersey dismissed Petitioner's 28 U.S.C. § 2255 Motion without holding an evidentiary hearing. *Unpublished letter opinion (Civil Action No. 00-1000 NHP).* [Appendix "B"]

On April 4, 2003, the United States Court of Appeals for the Third Circuit affirmed the decision of the District Court denying the § 2255 Motion. *2003 U.S. App. Lexis 6503 (3rd Cir. 2003).* [Appendix "A"]

On July 14, 2003, the Court of Appeals for the Third Circuit denied Petitioner's Petition for Rehearing or Hearing En Banc. [Appendix "C"]

STATEMENT OF JURISDICTION

The District Court had jurisdiction over this matter pursuant to 28 U.S.C. § 2255. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTION OF THE UNITED STATES

Fifth Amendment – Rights of Persons

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law

Sixth Amendment – Rights of Accused in Criminal Prosecutions

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

FEDERAL STATUTES

28 U.S.C. § 2255

> A prisoner in custody . . . claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . or is otherwise subject to collateral attack, may move the court

which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall... grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law. . . .

If the court finds that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A second or successive motion must be certified . . . by a panel of the appropriate court of appeals to contain...a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Title 18 – Section 1341

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin,

obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Title 18 – Section 1343

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five

> years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

THE IMPORTANCE OF GRANTING THE PETITION

There remains a particularly troubling split of opinion among the Circuit Courts of Appeals regarding the elements of the federal mail and wire fraud statutes. This Court's guidance is needed in order to harmonize the Court's decisions in *Chiarella v. United States*; *Neder v. United States*; *and Carter v. United States*.

In 1980, in *Chiarella v. United States*, this Court clearly articulated the common law principle that one who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under a duty to disclose. In 1999, in *Neder v. United States*, the Court clearly articulated that the mail and wire fraud statutes are not broader than common law fraud. *Neder* also clearly stated that when Congress enacts a statute using a common law term with a well-settled meaning, courts must infer that Congress intended to incorporate the common law meaning unless the statute specifies otherwise. Just a year later, in *Carter v. United States*, the Court reiterated its analysis in *Neder*, ruling that just as Courts must infer common law meaning from common law terms, so must they infer that common law terms cannot be disregarded when they do appear in a statute.

These holdings notwithstanding, Circuit Courts of Appeals have continued to rule that a duty to disclose is not an element of the federal mail and wire fraud statutes.

Petitioner was convicted under the mail and wire fraud statutes for failure to disclose certain information. The trial court refused to instruct the jury that in order to convict, they must find that Petitioner was under a duty to disclose. The Court of Appeals for the Third Circuit affirmed, holding that a duty of disclosure is not always a required element of the mail and wire fraud statutes.

Petitioner's case presents the ideal opportunity for the Court to dot the last "i" and cross the last "t" and clearly hold that a duty of disclosure is a required element of the mail and wire fraud statutes.

STATEMENT OF THE CASE

Petitioner Milton Sonneberg was convicted by a jury in the District Court of New Jersey on a thirty-count indictment based upon his participation in the promotion and sale of ownership interests in wireless cable television systems and radio stations. The indictment charged Petitioner with conspiracy, mail fraud, wire fraud, and the interstate transportation of money obtained through fraud. The overriding theme of the indictment and the government's presentation at trial was that Petitioner had defrauded his customers by failing to disclose to them that some years earlier he had pleaded guilty to a criminal securities violation. The indictment stated: "It was the principal object of the conspiracy . . . to omit and fail to make disclosures of material information to the investing public . . . regarding . . . the true backgrounds of the persons promoting and offering the investments."

Petitioner sought to rebut the government's charges with, *inter alia*, a tape recording on which a witness stated that he

planned to perjure himself at trial. One week after agreeing to "cooperate" with the prosecutor, Herb Herr, the government's star witness against Petitioner, was recorded saying to another indicted colleague:

> My feeling is we can lie better than he [Sonneberg] can tell the truth. Three good lies outweigh a good truth any time. . . . Well, that's his word [Sonneberg's] against ours. And if you're lying . . . you're going to have to lie and if he [Sonneberg] calls us, we're going to have to be consistent with the lie. And that's all there is to it.

The prosecution fought vigorously to keep the tape out of evidence. The trial judge eventually allowed Petitioner to use a small portion of a *transcription* of the tape on cross-examination. When counsel for Petitioner asked Herr if he had spoken the words cited *supra*, Herr answered no. When Petitioner's counsel showed him those excerpts the judge had admitted, Herr replied that he had must have been joking or in denial. Petitioner argued that without hearing the tape itself, the jury did not have the opportunity to qualitatively assess the context, the tenor, or the tone of voice in which the statements were made.

The trial judge then held that the tape became inadmissible surplusage once the jury had heard the excerpted transcribed portion. The government continued to insist the tape be kept out maintaining — quite astonishingly — that the tape was inadmissible because the only thing Petitioner could do with it was "impeach the witness's credibility."

SUMMARY OF ARGUMENT

Chiarella v. United States clearly articulated the common law principle that one who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under a duty to disclose. *Neder v. United States* clearly stated that *Durland v. United States*, 161 U.S. 306, 313-14 (1896), did not hold that the mail and wire fraud statutes are broader than common law fraud. *Neder* also clearly articulated the principle that courts must infer that Congress intended to incorporate the common law meaning into a statute unless the statute specifies otherwise. *Carter v. United States* stands for the principle that common law terms cannot be disregarded when found in a statute.

It is inconceivable under that framework that while Congress intended to make materiality an element of the offense, it also chose to exclude the common law principle that criminal liability for material omission requires a duty to disclose. The statute does not specify otherwise, and courts are bound to infer common law meanings unless Congress specifies otherwise. ("[A]ctionable fraud requires a material misrepresentation or omission") (citing Restatement (Second) of Torts §§ 538 (1977); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts §§ 108 (5th ed. 1984))). Accordingly, in a prosecution for omission of material information, a duty to disclose is an essential element of the offense.

Petitioner's conviction must be vacated.

ARGUMENT

In this petition for a writ of certiorari, Petitioner maintains that his conviction must be vacated because an intervening change in the law has clearly held that the conduct for which he was convicted was, and is, not criminal.

I. *Neder v. United States* and its Implications

On June 10, 1999, this Honorable Court held, *Neder v. United States*, that the federal mail and wire fraud statutes do not encompass more than common law fraud. The issue in Neder was "whether materiality is an element of a scheme or artifice to defraud under the federal mail fraud (18 U.S.C. § 1341), wire fraud (§ 1343) and bank fraud (§ 1344) statutes." *Id.* at 19, 1839, 54. This Court left no room for misunderstanding:

> It is a well-established rule of construction that where Congress uses terms that have accumulated settled meaning under the . . . common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.

Neder, at 22, 1840, 55. [Internal citations omitted]

> Thus, under the rule that Congress intends to incorporate the well-settled meaning of the common law terms it uses, we cannot infer from the absence of an express reference to materiality

> that Congress intended to drop that element from the fraud statutes. On the contrary, we must *presume* [emphasis in original text] that Congress intended to incorporate materiality.

Id.

> . . . [T]he fraud statutes did not incorporate *all* the elements of common-law fraud. But...the Government has failed to show that the [statutory] language is inconsistent with a materiality requirement.

Id.

In the instant matter, the prosecution insisted, and the lower courts erroneously agreed, that a duty to disclose is not an element of the federal mail and wire fraud statutes. *Neder* says just the opposite.

Fraud has accumulated a settled meaning under the common law. The mail and wire fraud statutes–the very same statutes at issue in *Neder* — do not otherwise dictate. Accordingly, the Courts in the instant matter must infer that Congress means to incorporate the established meaning of fraud into the mail and wire fraud statutes.

Thus, under the rule that Congress intends to incorporate the well-settled meaning of the common law terms it uses, the lower courts in the instant matter were wrong to infer from the absence of an express reference to a duty to disclose that Congress intended to drop that element from the fraud statutes. On the contrary, the lower courts should have *presumed* that Congress intended to incorporate a duty to disclose.

The government in the instant matter has failed to argue, let alone show, that the language of the mail and wire fraud statutes is inconsistent in any way with a duty to disclose requirement.

Just a year later, on June 12, 2000, this Court ruled on the converse of the *Neder* issue. In *Carter v. United* States, the petitioner argued that common law terms that had been included in a particular statute should be disregarded. The Court reiterated the reasoning in *Neder*:

> [W]e have not hesitated to turn to the common law for guidance when the relevant statutory text does contain a term with an established meaning at common law. In *Neder v. United States*, 527 U.S. 1, 144 L. Ed. 2d 35, 119 S. Ct. 1827 (1999), for example, we addressed whether materiality is required by federal statutes punishing a "scheme or artifice to defraud." *Id.* at 20, and 20-21, nn. 3-4 (citing 18 U.S.C. §§ 1341, 1343, 1344). Unlike the statute in *Wells*, which contained no common-law term, these statutes did include a common-law term — "defraud." 527 U.S. at 22. Because common-law fraud required proof of materiality, we applied the canon to hold that these federal statutes implicitly contain a materiality requirement as well. *Id.* at 23. Similarly, in *Evans v. United States*, 504 U.S. 255, 261-264, 119 L. Ed. 2d 57, 112 S. Ct. 1881 (1992), we observed that "extortion" in 18 U.S.C. § 1951 was a common-law term, and proceeded to interpret this term by reference to its meaning at common law.

II. The Intervening Change in the Law

This Court's decision in *Neder v. United States* was an intervening change in the law, applicable to Petitioner. The Court of Appeals incorrectly held that the law was not "intervening" as to Petitioner because the court misstated the date on which *Neder* was decided. The Court of Appeals incorrectly wrote: "In fact, Neder was decided on February 23, 1999." In fact, *Neder* was decided on June 10, 1999. Petitioner's conviction became final on March 5, 1999, three months *before* the decision in *Neder*, rendering the *Neder* decision "an intervening change in the law."[1]

Neder was a change in the law that directly affected the very core of Petitioner's case. Petitioner was convicted for failure to disclose information to potential customers. *Neder* held that the mail and wire fraud statutes do not go beyond the elements of common law fraud. It is difficult to imagine a case more clearly on point.

III. Duty to Disclose

The Court of Appeals made statements that directly contradict this Court's opinion in *Neder*. The Court of Appeals stated that "duty to disclose is not always a required element of common law fraud when there has been a material non-disclosure." The court went on to support that statement with a case from 1909, one from 1892, and a third from 1888.

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1. It is particularly unsettling that the Court of Appeals, in its opinion affirming the denial of Petitioner's 2255 motion, cited exactly the same incorrect date as did the prosecution in its brief, to support the erroneous conclusion that Neder was not "intervening" as to Petitioner. Petitioner fears that the Circuit Court did not accord his 2255 motion the *de novo* review to which it was entitled.

These cases are clearly inapposite since this Honorable Court — in *Neder* — made clear that *Durland* and its progeny do not support the proposition that the mail and wire fraud statutes sweep more broadly than common law fraud.

Continuing, the Court of Appeals wrote that Petitioner had ignored "the substantial precedent establishing that duty to disclose is not always a required element of common law fraud when there has been a material non-disclosure." In support, the court cited four cases from other circuits, cases that pre-date *Neder,* necessitating a careful review of any holdings related to the mail and wire fraud statutes and common law fraud. In the end, the Court of Appeals cited two cases from 2000 that also held that duty to disclose is not always a required element of common law fraud when there has been a material non-disclosure. These cases are clearly distinguishable on the facts and on the law. Moreover, Petitioner respectfully maintains that two Circuit Court opinions do not "substantial precedent" make. Petitioner respectfully maintains as well that the Court of Appeals erred when it identified the "precedent" as decisions from other circuits, rather than the United States Supreme Court's decisions in *Neder* and *Carter*.

At common law, defraud meant an affirmative misrepresentation of a material fact, or a failure to disclose if there is an independent duty to disclose. The duty to disclose "arises when one party has information that the other party is entitled to know because of a fiduciary or other similar relation of trust and confidence between them." *Chiarella*, at 228.

Even a casual reading of the record in this matter reveals that the government *could not prove* and *did not prove* that

Petitioner ever made affirmative misrepresentations. For that reason, every count in the indictment was clothed — nay bundled tight — in the issue of disclosure. But the prosecution also *could not prove* and *did not prove* that Petitioner was in a trust relationship with anyone he contacted about wireless cable or radio stations. At the risk of casting himself as a sleazy salesman, Petitioner continues to maintain — and the record reflects — that Petitioner was a salesman. He was a telemarketer who called people on the telephone and tried to sell them interests in business ventures. Petitioner was not their representative. He was not their broker. He was not an officer, director or principal of any company he was promoting, positions that might trigger a fiduciary or trust relationship. The indictment against Petitioner *did not charge* that the companies he was promoting were securities, a product that can, under certain circumstances, trigger a fiduciary relationship. But insistent on eating their cake and having it too, the prosecution mixed securities law in with common law fraud in an attempt to get to the affirmative misrepresentations or failure to disclose that it needed to have Petitioner convicted.

IV. It is Impossible to Tell on what Ground/Grounds the Jury Based Its Verdict

The verdict in this case must be vacated in its entirety. A general jury verdict cannot survive if one of the government's theories is unconstitutionally or legally insufficient. *Yates v. United States*, 354 U.S. 298, 312 (1957). Using the familiar "impossible to tell" concept, it is, in fact, impossible to tell what the jury decided and on what grounds they reached their verdict.

Most significant, the trial judge and the prosecution unknowingly, but presciently, ruled that Petitioner's conviction must now be vacated in its entirety. The following statements were made on the record made by the court and by the government:

> In the case at hand, the reference in the Indictment to the prior criminal convictions and civil fraud injunctions are not only relevant, *but actually constitute the alleged misrepresentation which caused the conspiracy to defraud*. . . .

(A-23) [emphasis added].

> [T]he Government's recitation of defendants' past criminal convictions and civil fraud injunctions in the relevant counts does not create grave doubt [about the independence of the grand jury]. *Rather, this information is a crucial element of the fraud charges asserted against defendants*. . . .

(A-32) [emphasis added].

> Moreover, *these acts* [the unfounded allegations of material misrepresentation] *are evidence which the Government will allegedly use* to prove defendants' background plan, intent, motive and knowledge *in support of the fraud and the conspiracy charges*.
>
> *These activities are inextricably intertwined with the charged offenses*. . . .

(A-24) [emphasis added].

The counts alleging affirmative misrepresentations and the counts alleging failure to disclose are "inextricably intertwined." It is impossible to tell.

V. Failure to Disclose Requires a Duty To Disclose

A. The Failure of a Court to So Instruct a Jury Can Never Be Harmless Error

The failure to instruct on a duty to disclose can never be harmless error if common law principles apply in a non-disclosure prosecution under the mail and wire fraud statutes. The jury is presumed to follow the instructions they are given. The federal fraud statutes fail to specify what conduct constitutes criminal non-disclosure. While it might be clear what constitutes a misrepresentation, for a non-disclosure, absent other guidance, a criminal defendant inevitably relies on the common law (and common sense) principle that one commits fraud by failing to disclose only when he is under a duty to do so.

Otherwise, after the consummation of a transaction, any dissatisfied party could invoke the criminal fraud statutes to claim "but-for" the fact they were unaware of certain information, they never would have entered into the transaction. Commerce would come to a standstill. Any information not disclosed prior to the consummation of the transaction could retroactively become a material omission, even though the "injured" party never inquired as to such facts.

In truth, the failure to inquire stems from the fact that the information was not truly material to the original decision to engage in the transaction. The notion of caveat emptor

would be consigned to the trash bin of history, and the government could charge anyone at any time with criminal non-disclosure. The notion of "notice" that is required for the imposition of either civil or criminal liability would become meaningless.

Proof of intent would be nullified for it would be impossible to determine whether a question never asked, but that might have been answered truthfully, equals criminal intent not to offer information. The reach of such a criminal construct must inevitably lead to absurd and limitless results.

VI. Circuit Split

The Sonneberg decision is inconsistent with the following decisions of sister circuits:

United States v. Watkins, 278 F.3d 961 (9th Cir. 2002), — which ruled that the *Neder* decision "settles the analytical framework for interpretation of 'intent to defraud.'" *Watkins* imports into the federal fraud statutes the common law meaning of the word "defraud" stating that the fraud statutes impose criminal liability for affirmative misrepresentations.

Ayres v. General Motors Corporation, 234 F.3d 514 (11th Cir. 2000), — which held that the manufacturer's failure to inform the plaintiffs of potential problems with a component, even if required by the Safety Act, did not violate federal mail and wire fraud statutes.

In ***Ayres***, the Court wrote:

> An examination of the common law with respect to when a failure to disclose is fraudulent also

> supports the proposition that a nondisclosure of material information can constitute fraud when there is a duty to disclose. In *Chiarella v. United States*, 445 U.S. 222, 100 S. Ct. 1108, 63 L. Ed. 2d 348 (1980), the Supreme Court explained: At common law misrepresentation made for the purpose of inducing reliance upon the false statement is fraudulent. But one who fails to disclose material information prior to the consummation of a transaction commits fraud only when one party has information "that the other party is entitled to know because of a fiduciary or other similar relationship of trust and confidence between them." *Id.* at 227-28, 100 S. Ct. at 1114.

Langford v. Rite-Aid of Alabama, Inc., 231 F.3d 1308 (11th Cir. 2000), — which ruled that there can be no liability under the federal fraud statutes for failure to disclose absent a duty to make disclosure. [Failure to disclose pricing policies to uninsured retail drug customers will not sustain an action for fraud].

United States v. Gee, 225 F.3d 885 (7th Cir. 2000), — which states there is no liability for fraud unless the defendants made a material misrepresentation.

In re J.T. Haun, CTA6 No. 01-6067 — wherein the Sixth Circuit compared the *Neder* decision to the change in law brought about by *Bailey v. United States*, 516 U.S. 137 (1995). It directed Haun to present his claim of actual innocence based on *Neder* to the district court in the format for an application for habeas corpus under Section 2241 as opposed to an application for leave to file a second or successive 2255 motion.

United States v. Colton, 231 F.3d 890 (4th Cir. 2000), — which ruled against the defendant on a theory of fraudulent concealment of material information from a bank; but ruled that mere non-disclosure does not constitute the basis for fraud liability, stating that mere "silence" does not give rise to an action for fraud.[2] The Court stated that *Neder* "articulated the outer boundary for the interpretation of the federal fraud statutes." The *Colton* decision acknowledged that *Neder* rejected *Durland v. United States*, 161 U.S. 306, 313-14 (1896), and had limited the scope of the federal fraud statutes to the territory covered by common law fraud.

The Sonneberg decision is inconsistent with decision of the Fourth, Sixth, Seventh, Ninth and Eleventh Circuits. The Court should grant certiorari to resolve the conflict.

CONCLUSION

Petitioner prays that this Honorable Court grant the writ and vacate the conviction. Alternatively Petitioner respectfully asks that he be heard in oral argument.

Respectfully submitted,

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2. By contrast, in *Sonneberg*, the District Court's overly broad interpretation of the scope of the fraud statutes caused it to expressly instruct the jury that "silence" did constitute grounds for conviction. (A.1479; TT 3059:24).

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED APRIL 4, 2003

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 01-2607

MILTON SONNEBERG,

Appellant

v.

UNITED STATES OF AMERICA

On appeal from the United States District Court
for the District of New Jersey

District Court Judge: The Honorable Nicholas H Politan
(D.C. Civil No. 00-cv-1000)

Submitted Under Third Circuit L.A.R. 34.1(a)
January 14, 3003

Before: ROTH, FUENTES, Circuit Judges,
and ALDISERT, Senior Circuit Judge

(Opinion Filed: April 4, 2003)

OPINION OF THE COURT: FUENTES, Circuit Judge

Appendix A

Milton Sonneberg appeals the District Court's denial of his petition for collateral relief pursuant to 28 U.S.C. § 2255. Sonneberg was convicted of conspiracy to commit wire fraud and mail fraud, wire fraud and multiple counts of each of mail fraud and interstate transportation of money obtained through fraud. Sonneberg contends in his Section 2255 petition that the Supreme Court's decision in **Neder v. United States**, 527 U.S. 1 (1999), is an "intervening change in the law" that establishes that he has been convicted for offense conduct that is not a crime. We disagree. For the reasons that follow, we will affirm the District Court's denial of Sonneberg's Section 2255 petition.

I. BACKGROUND

Sonneberg was indicted by a federal grand jury on April 23, 1995, along with Irwin H. Block (sic) (a/k/a "Sonny Bloch"), James Barschow , Joseph Glenski, and Bruce Schroeder. Sonny Bloch pleaded guilty to eight of the thirty-five counts in the indictment on September 18, 1996. A federal grand jury returned a thirty-count superceding indictment against the remaining four defendants on December 18, 1996. Barschow, Glenski and Schroeder pleaded guilty to nine counts on April 9, 1997. Another thirty-count superceding indictment was filed against Sonneberg on April 23, 1997. In that indictment, Sonneberg was charged with the following offenses: (1) conspiracy to commit wire fraud and interstate transportation of money obtained through fraud in violation of 18 U.S.C. § 371; (2) conspiracy to commit mail fraud and interstate transportation of money obtained through fraud in violation

of 18 U.S.C. § 371; (3) wire fraud in violation of 18 U.S.C. § 1343; (4) four counts of mail fraud in violation of 18 U.S.C. § 1341.

A trial commenced on May 1, 1997. In brief, the facts established at trial show that Sonneberg, Bloch, Barschow, Glenski and Schroeder conspired to market limited liability company ("LLC") interests in a series of wireless cable television ventures and in a proposed radio-station network. The conspirators' sales pitches promised potential investors unparalleled opportunities in the cutting-edge technology of wireless cable television systems and a network of independent broadcasters owned by "Bloch Broadcasting." The problem with the sales pitches was there were no viable business ventures behind them. In fact, the wireless cable systems being promoted did not have any of the resources, such as profitable channels, sites and FCC licenses , necessary to make them operable, much less profitable. And "Bloch Broadcasting" was a shell company with no assets. Nonetheless, the promoters raised millions of dollars from investors. Approximately forty percent of the investor money was paid to the conspirator-promoters in the form of sales commissions.

Sonny Bloch touted the sale of the LLCs on his nationally-syndicated radio program, "The Sonny Bloch Radio Show." Bloch had 1.5 million listeners and a good reputation as a consumer advocate. He agreed to endorse the sale of the LLCs and to vouch for the character of the promoters and the financial soundness of the ventures on his radio program. Despite the fact that Bloch was paid $2000

per week for these endorsements, he made them sound personal rather than commercial. The conspirators used Bloch's radio program to develop leads to market the LLCs.

The conspirators also developed sales brochures for each of the LLCs they were promoting. The brochures included inflated financial projections and promised unrealistically high returns. The brochures misrepresented the true identity of the principals in the ventures, how the investment money would be allocated, the claims regarding the subscribership base for the ventures, and the ability of investors to participate in management decisions. The brochures also failed to disclose the prior criminal convictions and civil fraud injunctions against certain of the conspirators, including Sonneberg.

On May 29, 1997, Sonneberg was convicted of all thirty counts alleged in the indictment. The District Court sentenced him to a 76 month prison term and ordered him to pay $5.2 million in restitution. Sonneberg appealed his conviction and sentence. On August 12, 1998, this court affirmed his conviction and sentence by judgment order. **United States v. Sonneberg**, 164 F.3d 621 (3d Cir. 1998) (unpublished, non-precedential opinion). The Supreme Court denied his petition for certiorari on March 5, 1999.

On March 1, 2000, Sonneberg filed a petition for collateral relief pursuant to 28 U.S.C. § 2255. While that petition was pending in the District Court, Sonneberg filed a petition for a writ of mandamus, which this Court denied on March 20, 2001. On April 6, 2001, the District Court denied his Section 2255 petition and denied him a certificate of

appealability. The District Court denied Sonneberg's motion to reconsider.

On May 2, 2001, Sonneberg filed a timely notice of appeal and a request for a certificate of appealability from this Court. By order dated June 18, 2002, this Court granted Sonneberg a certificate of appealability limited to two of his claims: (1) that the District Court failed to instruct the jury on an element of the offense; and (2) that the government used an untenable theory of materiality, resulting in a conviction for offense conduct that is not a crime.

II. ANALYSIS

The District Court had jurisdiction over Sonneberg's petition for collateral relief pursuant to 28 U.S.C. § 2255. We have jurisdiction over his appeal pursuant to 28 U.S.C. § 2255, 1291. We have plenary review over the District Court's denial of Sonneberg's Section 2255 petition. **United States v. Lloyd**, 188 F.3d 184, 186 (3d Cir. 1999).

28 U.S.C. § 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to

> collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct the sentence.

It is well settled that a petitioner generally may not relitigate issues that were decided adversely to him on direct appeal by means of a Section 2255 petition. **See United States v. DeRewal**, 10 F.3d 100, 105 n.4 (3d Cir. 1994). An exception exists, however, when there has been an "intervening change in the law" affecting the claim previously decided adversely to the petitioner. **See Davis v. United States**, 417 U.S. 333 (1974).

The certificate of appealability sets forth two claims: (1) that the District Court failed to instruct the jury on an element of the offense; and (2) that the government used an untenable theory of materiality, resulting in a conviction for offense conduct that is not a crime. As Sonneberg's brief makes clear, these two claims collapse into one argument that, prior to finding liability for mail and wire fraud on the basis of a material non-disclosure, a jury must first find that the defendant was under a duty to disclose, and that, in this case, the District Court erred in failing to instruct the jury on this element of the offense.

This claim was previously litigated on direct appeal. The first issue raised in Sonneberg's opening brief on direct appeal is "The Jury Was Improperly Permitted to Convict on the Basis of Nondisclosures." (Supp. App. at p. 9) The arguments he made in support of the asserted error were as follows: (1) the mail and wire fraud statutes require a duty to disclose before imposing liability for a material omission;

(2) because he had no duty to disclose his prior guilty plea and civil injunction, he was convicted on a legally insufficient theory; (3) the jury was never instructed that it had to find that he had a legal duty to disclose; and (4) reversal is required because the jury was permitted to find guilt on legally impermissible and unconstitutional theory. **Id.** at 9-10. After considering Sonneberg's arguments, this Court affirmed his conviction and sentence. **United States v. Sonneberg**, 164 F.3d 621 (3d Cir. 1998) (unpublished, non-precedential opinion). Thus, this Court has already considered the central argument raised by Sonneberg in his Section 2255 petition namely, that the duty to disclose is a required element of the offenses of mail and wire fraud.

Despite the fact that we have already decided this issue adversely to Sonneberg, he urges us to reconsider it in light of **Neder v. United States**, 527 U.S. 1 (1999), which he asserts is an "intervening change in law." We do not agree that Neder is an intervening change in the law warranting relitigation of the issue already decided on direct appeal. First, **Neder** is not a "change in law" because the two holdings of Neder do not pertain to the issue raised by Sonneberg. In fact, **Neder** did not change the state of the law pertaining to whether a duty to disclose is an element of the offenses of mail and wire fraud. And second, **Neder** is not an intervening decision.

In Neder, the defendant had been "tried on charges of violating a number of federal criminal statutes penalizing fraud." 527 U.S. at 4. The government conceded that the district court erred in refusing to submit the issue of materiality to the jury with respect to the tax fraud charges.

Id. The Supreme Court held that an instruction that omits an element of the offense, such as the instruction on tax fraud, does not necessarily render a criminal trial unfair, and is thus subject to harmless error analysis. **Id**. at 4, 9. The Court also held that "*materiality is an element of the federal mail, wire and bank fraud statutes*." **Id**. at 4 (emphasis added).

In this case, the District Court properly instructed the jury that materiality is an element of the offenses of wire and mail fraud. (App at pp. 40-471). Sonneberg does not contest the District Court's materiality instruction. Instead, Sonneberg argues that the District Court failed to instruct the jury that duty to disclose is an element of the offenses in mail and wire fraud when there is an allegation of a material non-disclosure. Neither holding of **Neder** bears on that argument.

Sonneberg argues, however, that certain language in Neder supports his argument that the duty to disclose is an element of mail and wire fraud. Specifically, he points to the Court's rejection of the government's argument that Congress "chose to unmoor the federal mail fraud statute from its common-law analogs . . ." **Neder**, 527 U.S. at 24. Based on this statement, Sonneberg contends that, because duty to disclose was an element of common-law fraud, it must remain an element of the federal mail and wire fraud statutes. Sonneberg overlooks the fact that in determining that the common-law element of materiality remains an element of federal mail and wire fraud, the Court observed that "*the fraud statutes did not incorporate all the elements of common-law fraud.*," including the elements of reliance and damage. **Id**. at 24-25 (emphasis in original). Sonneberg also

disregards the fact that the Court was only considering the element of materiality in the **Neder** decision. Thus, the language cited by Sonneberg is not sufficiently precise to be an "intervening change in law" warranting relitigation of an issue previously decided on direct appeal.

Sonneberg also overlooks the substantial precedent establishing that duty to disclose is not always an element of common-law fraud when there has been a material non-disclosure. In a decision post-dating Neder, the Fourth Circuit recognized that "[t]he Supreme Court has recently articulated an outer boundary for the interpretation of the federal fraud statutes," but nonetheless found that "at common law, no fiduciary relationship, no statute, no other independent legal duty to disclose is necessary to make active concealment actionable fraud - simple 'good faith' imposes an obligation not to purposefully conceal material facts with intent to deceive." **United States v. Colton**, 231 F.3d 890, 899-900 (4th Cir. 2000) (citing **Neder**, 527, at 1; **Strong v. Repide**, 213 U.S. 419, 430 (1909); **Tyler v. Savage,** 143, U.S. 79, 98 (1892); **Stewart v. Wyoming Cattle Ranch Co.**, 128 U.S. 383, 388 (1888)); **United States v. Keplinger**, 776 F.2d 678, 697-98 (7th Cir. 1985); **United States v. Townley**, 665 F.2d 579, 585 (5th Cir. 1982); **United States v. Allen**, 554 F.2d 398, 410 (10th Cir. 1977). ***Thus it is clear that both before and after the Neder decision, duty to disclose is not a required element of the common-law offenses when there have been material non-disclosures.***

Not only is Neder not an (sic) "change in law" with respect to Sonneberg's claim, it is also not "intervening." Sonneberg's conviction and sentence were affirmed by this

Court on August 12, 1998. He petitioned to the Supreme Court for certiorari, and raised the issue of whether "a defendant may be convicted under the federal mail and wire fraud statutes for failing to disclose certain information despite having no duty to disclose that information." (Supp. App. At p. 232). Sonneberg's petition for certiorari was pending when the Court decided **Neder**. ***In fact, Neder was decided on February 23, 1999, and the Court denied Sonneberg's petition on March 5, 1999.*** Because Sonneberg's petition was not final until his petition for certiorari was denied, see **Kapral v. United States**, 166 F.3d 565, 570 (3d Cir. 1999), the **Neder** decision was not "intervening." Moreover, because Sonneberg's petition was still pending when **Neder** was decided, if the Court thought that **Neder** was relevant to Sonneberg's claims, the Court could have remanded his case for further proceedings. Instead the Court simply denied Sonneberg's petition.

In sum, because Sonneberg has not established an "intervening change in law" he is not entitled to relitigate the claim decided adversely to him on direct appeal. Accordingly, we will affirm the District Court's denial of Sonneberg's Section 2255 petition.

TO THE CLERK OF THE COURT

Kindly file the foregoing Opinion

/s/
Julio M. Fuentes
Circuit Judge

APPENDIX B — LETTER OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED APRIL 6, 2001

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
NICHOLAS H. POLITAN
JUDGE

April 6, 2001

LETTER OPINION
ORIGINAL ON FILE WITH
CLERK OF THE COURT

Mr. Milton Sonneberg
Reg. No. 20869-050
P.O. Box 1000
Fort Dix, NJ 08640
Petitioner *Pro Se*

Alain Leibman, Assistant
U.S. Attorney
ROBERT J. CLEARY, UNITED STATES ATTORNEY
970 Broad Street
Newark, NJ 07102
Attorney for Respondent

Re: Milton Sonneberg v. United States
Civil Action No. 00-1000 (NHP)

Appendix B

Dear Litigants:

This matter comes before the Court on the petition of Milton Sonneberg to vacate, set aside or correct a sentence pursuant to 28 U.S.C. 2255. This matter was resolved without oral argument pursuant to Fed.R.Civ.P. 78. The Court has reviewed the written submissions of the parties and, for the reasons explained herein, the petition of Milton Sonneberg to vacate, set aside, or correct the sentence is **DENIED** and **DISMISSED**. No certificate of appealability shall issue. This case is now **CLOSED**.

BACKGROUND

Petitioner, Milton Sonneberg ("petitioner"), acting *pro se*, brings this civil action pursuant to 28 U.S.C. § 2255 to vacate, set aside or correct the sentence, or in the alternative, to remand for an evidentiary hearing.

The facts of this case are fairly straightforward. Petitioner was indicted by a federal grand jury on April 23, 1995, along with four other individuals: Irwin H. Block (sic), a/k/a "Sonny Block," James Barschow, Joseph Glenski, and Bruce Schroeder. Sonny Bloch pled guilty to eight counts in the thirty-five count indictment on September 18, 1996.

A federal grand jury returned a thirty-count superseding indictment against the remaining defendants on December 18, 1996. A trial was scheduled to begin on April 7, 1997. On April 9, 1997 Glenski, Schroeder, and Barschow pled guilty to nine counts in the superseding indictment.

Appendix B

A thirty-count second superseding indictment was filed against petitioner on April 23, 1997. This indictment charged petitioner with the following offenses: conspiracy to commit wire fraud and interstate transportation of money obtained through fraud in violation of 18 U.S.C. § 371; conspiracy to commit mail fraud and interstate transportation of money through fraud in violation of 18 U.S.C. § 371; wire fraud in violation of 18 U.S.C. § 1343; twenty-three counts of interstate transportation of money obtained through fraud in violation of 18 U.S.C. § 2314; and four counts of mail fraud in violation of 18 U.S.C. § 1341.

A trial commenced on May 1, 1997, and petitioner was convicted of all thirty counts on May 29, 1997. This Court sentenced petitioner on December 16, 1997, to a seventy-six month term of imprisonment, followed by five years of supervised release. Petitioner was also ordered to pay %5.2 million in restitution. Final judgment was entered on January 9, 1998.

Petitioner filed a notice of appeal from his conviction. On August 12, 1998, the Court of Appeals for the Third Circuit affirmed petitioner's conviction. The United States Supreme Court denied his petition for *certiorari* on March 5, 1998.

Petitioner filed the instant petition on March 1, 2000. He filed a writ of mandamus with the Court of Appeals for the Third Circuit on August 13, 2000. That court denied petitioner's writ of mandamus on March 20, 2001. In his petition, petitioner claims several errors occurred at trial, including the following: (1) the district court failed to instruct

the jury on an element of the offense; (2) the government used an untenable theory of materiality; (3) ineffective assistance of counsel based on counsel's (a) permitting the presentation of false testimony by government; (b) permitting of inadmissible evidence; c) conflict of interest; and (d) failure to recognize and defend against the aforementioned alleged errors.

Discussion

I. ***Standard of Review***

Section 2255 of Title 28 of the United States Code provides a means of collaterally attacking a sentence imposed after a conviction. Section 2255 provides, in pertinent part:

> A petitioner in custody under the sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. . . .

The grounds for collateral attack of a sentence pursuant to Section 2255 are narrowly limited. *See United States v. Biberfeld*, 957 F.2d 98, 102 (3d Cir. 1992). The Third Circuit has recognized that "not all non-constitutional errors in

criminal proceedings enable a prisoner to bring an action under [Section] 2255 for relief." *Diggs v. United States*, 740 F.2d 239, 242 (3d Cir. 1984); *accord United States v. Vancol*, 778 F.Supp. 219, 22 (D.Del. 1991), *aff'd*, 970 F.2d 901 (3d Cir. 1992).

A motion under Section 2255 will be granted "only if the sentence results in 'a fundamental defect which inherently results in a complete miscarriage of justice' or 'omission inconsistent with rudimentary demands of fair procedure.'" *United States v. Cannistraro*, 734. F.Supp. 1110, 1119 (D.N.J. 1990) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)); *see also United States v. DeLuca*, 889 F.2d 503, 506, 93d. Cir. 19898), *cert. denied*, 496 U.S. 939 (1990); *Vancol*, 778 F.Supp. at 222-23. Similarly, errors of fact will not provide a basis for relief unless "the errors were of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid." *United States v. Addonizio*, 442 U.S. 178, 185-86 (1979) (quoting *United States v. Mayer*, 235 U.S. 55, 69 (1914)).

A petitioner's failure to raise a particular error either at trial or on direct appeal generally precludes the assertion of that error for the first time in a collateral attack under Section 2255. *See United States v. Essig*, 10 F.3d 968, 979 (3d Cir. 1993); *United States v. DeRewal*, 10 F.3d 100, 105 n.4 (3d Cir. 1993), *cert. denied*, 511 U.S. 1033 (1994); *United States v. Oser*, 864 F.2d 1056, 1061 (3d Cir. 1988). Where a Section 2255 motion rests on issues not raised at trial or on direct appeal, the petitioner bears the burden of demonstrating both "cause" to excuse the procedural default and that "actual prejudice" will result from the errors at issue. *See United*

States v. Frady, 456 U.S. 152, 167, *reh'g denied*, 456 U.S. 1001 (1982); *Essig*, 10 F.3d at 979; *DeRewal*, 10 F.3d at 105 n.4; *Biberfeld*, 957 F.2d at 104. "[T]he existence of cause for procedural default must ordinarily turn on whether some objective factor external to the defense impeded counsel's effort to comply with the . . . procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *see also Essig*, 10 F.3d at 979.

II. *Duty to Disclose*

Petitioner claims he was improperly convicted of mail and wire fraud based upon his failure to disclose to investors his prior criminal conviction and civil fraud injunction. He argues that his conviction cannot stand because the law imposed upon him no duty to disclose such information. Petitioner's premise is flawed. ***As respondent correctly points out, the mail and wire fraud statutes are not limited to matters which would be punishable as common law fraud. See Durland v. United States, 161 U.S. 306, 313-14 (1896)***; *United States v. Moore*, 37 F.3d 169, 172-73 (5th Cir 1994); *United States v. Stewart*, 872 F.2d 957, 960; *United States v. Bishop*, 825 F.2d 1278, 1280 (8th Cir. 1987). "[O]missions or concealment of material information can constitute fraud . . . cognizable under the mail fraud statute, without proof of a duty to disclose the information pursuant to a specific statute or regulation." *United States v. Keplinger*, 776 F.2d 678, 697 (7th Cir. 1985), *cert. denied*, 476 U.S. 1183 (1986). ***Thus, petitioner was not entitled to a duty to disclose instruction because it is not an essential element of the offense of mail or wire fraud.*** *See United States v. Maxey*, 898 F.2d 148 (4th Cir. 1990). Indeed, as the Fifth Circuit has

indicated, petitioner's contention that he had no duty under the law to disclose his criminal conviction is therefore "irrelevant" to the question before this Court.[1] *See Moore*, 37 F.3d at 172. Also, the Third Circuit rejected this same argument in affirming petitioner's conviction upon direct review.

In addition, petitioner's reliance on *Chiarella v. United States*, 445 U.S. 222 (1980) is misplaced. *Chiarella* involved a defendant's conviction under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and SEC Rule 10b-5; not mail and wire fraud as is the case here. *Chiarella* simply is not applicable to this case. As petitioner has not established a fundamental defect which would inherently result in a complete miscarriage of justice, his claim on this basis is denied.

III. *Improper Jury Charge*

Petitioner next contends that the Court improperly charged the jury regarding the concept of materiality. This argument is likewise without merit. This Court at trial

1. The Court notes that the indictment charged not only charged petitioner with failure to disclose his previous criminal conviction and civil fraud injunction, but also charged petitioner with affirmative misrepresentations, false and misleading statements and material omissions of fact made with regard to such as the true identity of the principals involved in the investment schemes, the uses of the proceeds, the profits to be made, and the ability of investors to participate in management decisions. Thus, the jury was not invited to convict petitioner on the basis of omissions alone; it is quite possible the jury convicted petitioner on the basis of affirmative misrepresentation and concealment as well.

defined materiality in the following manner: "[a] material fact is a fact that would have a natural tendency to influence or be capable of influencing a person making a decision about a particular matter of transaction." This language is virtually identical to the language consistently used by the Supreme Court in defining "materiality." In *United States v. Wells*, 519 U.S. 482 (1997), the Supreme Court defined materiality as "hav[ing] a natural tendency to influence or [being] capable of influencing the decision of the decisionmaking body to which it was addressed." *See also Kungys v. United States*, 485 U.S. 759, 770 (1988). The Third Circuit has expressed a similar definition of materiality. *See In re David Louis Cohn*, 54 F.3d 1108, 1114 (3d Cir. 1995); *United States v. Greber*, 760 F.2d 68, 73 (3d Cir. 1985). The Third Circuit also rejected this claim upon petitioner's direct appeal.

In addition, the court instructed the jury that the charged schemes included both false statements about the details of the venture, such as the use to be made of the investors' money , and the failure to disclose material facts about the investment and petitioner and others involved in the ventures. Moreover, the Court also instructed the jury that while it was not required to find that every charged component of the scheme was proved, it did have to find that "the scheme, substantially as charged, was set up." As a result, petitioner's reliance on *Yates v. United States*, 354 U.S. 298 (1957) is mistaken, since *Yates* requires reversal only when the jury's verdict may have rested on a legally invalid ground and "it is impossible to tell which ground the jury selected." 354 U.S. 298, 312.

Here, it is not impossible to discern which ground the jury selected. It is entirely possible that the jury's verdict meant it found that the scheme was set up "substantially as charged." It is unlikely the verdict would have been different if the single charge of concealment of petitioner's criminal conviction and civil injunction had not been included in the indictment. Even assuming *arguendo* that the Court improperly instructed the jury, any error was harmless. *See Neder v. United States*, 527 U.S. 1, 6-8 (1999) ("[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutiona[l] errors that may have occurred are subject to harmless-error analysis.") (quoting *Rose v. Clark*, 478 U.S. 570, 579 (1986)). Moreover, at trial the government presented substantial and overwhelming evidence that petitioner had participated in a scheme to defraud by failing to disclose to the investors that he had been convicted of conspiracy to commit securities fraud and permanently enjoined from selling securities. The government also advance significant evidence of petitioner's fraudulent intent and active participation in the conspiracy. Accordingly, petitioner's claims on this basis must be denied.

IV. *Perjury*

Petitioner also alleges several witnesses and co-conspirators presented perjured testimony at trial and that the prosecution know of the perjury but still presented the witnesses in any event. These instances of perjury, it is argued, rose to the level of constitutional violation. Yet, petitioner proffers on bald, conclusory and self-serving allegations of perjury. No factual evidence of perjury

committed by any witness, co-conspirator or co-defendant is offered by petitioner. Petitioner's claims based on perjury must accordingly be denied.

V. *Ineffective Assistance of Counsel*

Petitioner next argues that his trial counsel was ineffective because he failed to object to the admissibility of audio tapes presented by a witness named Lionel Benedict. Petitioner contends that the government and defense counsel knew the tapes were inadmissible. His only objection to the tapes is that they were incomplete. Petitioner asserts that his trial counsel was "too inept and intimidated" to properly advocate his position. Furthermore, petitioner alleges that this admission was a violation of Federal Rule of Evidence 107.

In order to prevail on his claim of ineffective assistance of counsel, petitioner must satisfy a two-prong test. First petitioner must prove that counsel's performance was so grossly deficient as to deny the petitioner his Sixth Amendment right.

See Strickland v. Washington, 466 U.S. 668, 687 (1984). In order to prove a deficient performance, petitioner must show that counsel's representation fell below " an objective standard of reasonableness." *See* id. at 688. In demonstrating such deficient performance, the petitioner must show that, in effect, counsel's errors were so serious that "counsel was not functioning" as an advocate. *See id.* at 687. A court "must indulge a strong presumption that counsel's conduct falls within range of reasonable professional assistance . . ." *Id.* at 691.

Second, to prove ineffective assistance of counsel must show that he was prejudiced as a result of the deficient performance of his attorney. *See id.* at 687. To show such prejudice, petitioner must prove that the errors of the attorney were "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* The petitioner must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Petitioner's ineffective assistance of counsel claim is without merit. Petitioner offers only vague and self-serving allegations that his counsel, Mr. Moskowitz, failed to notify the Court of false testimony[2] and failed to object to the admissions of the Lionel Benedict audio tapes. Petitioner has offered no evidence substantiating these allegations.

To the contrary, the record demonstrates that Mr. Moskowitz provided a solid and spirited defense on petitioner's behalf, and in no way fell below a standard of reasonableness. Mr. Moskowitz did indeed challenge the authenticity of the Lionel Benedict tapes. Moreover, through vigorous cross-examination, Mr. Moskowitz obtained concessions from several witnesses that they lied on prior occasions and made statements that were inconsistent with their testimony at trial. Assessing Mr. Moskowitz's overall performance during the trial, this Court cannot say that his representation fell below an objective standard of reasonableness. Indeed, even assuming *arguendo*

2. Since no evidence of perjury has been offered, any ineffective assistance of counsel claim based upon Mr. Moskowitz's alleged failure to address perjurious testimony is meritless.

Mr. Moskowitz's performance was deficient, petitioner suffered no prejudice since it is unlikely the result would have been different in light of the overwhelming evidence offered against him. Accordingly, petitioner's ineffective assistance of counsel claim is denied.

Petitioner also asserts a claim of ineffective assistance of counsel based upon a conflict of interest. It is alleged that Petitioner's second defense counsel, Gail Nichols, Esq. ("Nichols"), resigned as defense counsel after serving for more than a year in that capacity. Petitioner argues that Nichols suffered from an actual conflict of interest because she resigned to become chief of the criminal division of the same United States Attorney's Office which prosecuted petitioner.

Where an ineffective assistance of counsel claim is based upon the existence of a conflict of interest arising from counsel's multiple representation, the petitioner "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). The mere possibility of a conflict of interest is not sufficient to collaterally attack a conviction. *See id.* Furthermore, once an actual conflict of interest is found the petitioner need not prove prejudice. *See id.* At 349-50. The Supreme Court has not expanded the standard set forth in *Cuyler* beyond cases involving multiple representation.

Petitioner's conflict of interest claim is likewise without merit. First, ineffective assistance of counsel based on a conflict of interest typically involves multiple representation,

where a lawyer defends two or more clients or represents or previously represents a testifying witness. A conflict of interest may also arise where an attorney was involved in the alleged criminal activity. This case, however, does not involve multiple representation. Rather, it deals with Nichols joining the United States Attorney's Officer (sic). Other than self-serving conclusions, petitioner fails to establish an actual conflict of interest on Nichols' part. Indeed, there is not even an existence of a "possibility" of a conflict of interest, which in any event would not suffice to collaterally attack a conviction.[3] Petitioner offers only speculation and his own suspicion of a conflict of interest. He has not explained what Nichols did, or failed to do, as a result of the purported conflict which may have affected the outcome of the trial. This is not sufficient to grant petitioner's request for relief. As a result, petitioner's claim of conflict of interest must be denied.[4]

Lastly, petitioner in his amended petition alleges government misconduct contributed to his convictions (sic). He presents not a shred of evidence of government misconduct. Nor has petitioner shown he was deprived of a

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3. Nichols' representation of petitioner ended before the criminal trial commenced.

4. To the extent that, as respondent suggests, petitioner's claim of conflict of interest is actually a general ineffective assistance of counsel claim because petitioner alleges Nichols' attention to his case diminished at some point, this claim is also denied. There is no evidence that Nichols' performance fell below an objective standard of reasonableness and no evidence that petitioner suffered prejudice as a result of any alleged deficiency in Nichols' representation.

fair trial in any way. This Court previously found no government conduct (sic) occurred at trial. The Third Circuit similarly rejected petitioner's claim on this basis upon direct review.

Because petitioner's claims are wholly without merit, no evidentiary hearing is warranted and the petition is denied and dismissed.

CONCLUSION

For the aforementioned reasons, the petitioner Milton Sonneberg's petition to vacate, set aside, or correct the sentence pursuant to 28 U.S.C. § 2255 is **DENIED** and **DISMISSED.** Accordingly, this case is now **CLOSED**.

A certificate of appealability shall not issue since the petitioner has not made a substantial showing of the denial of a constitutional right.

An appropriate Final Order accompanies this Letter Opinion.

/S/ Nicholas H. Politan
NICHOLAS H. POLITAN
U.S.D.J

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED JULY 14, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No.01-2067

MILTON SONNEBERG,

Appellant

v.

UNITED STATES OF AMERICA

On Appeal from the United States District Court
for the District of New Jersey

District Court Judge: The Honorable Nicholas H. Politan
(D. C. Civil No. 00-cv-01000)

SUR PETITION FOR REHEARING EN BANC

Present: SCIRICA, *Chief Judge*, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO FUENTES, SMITH, *Circuit Judges*, and ALDISERT[1]

The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges

1. Judge Aldisert is limited to panel rehearing only.

who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT

/s/
United States Circuit Judge

DATED: JUL 14 2003

(2)

No. 03-752

Supreme Court, U.S.
FILED
FEB 3 - 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MILTON SONNEBERG,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR REHEARING

MILTON SONNEBERG
Petitioner, pro se
33 Abbey Close
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I. WILL THE UNITED STATES SUPREME COURT COUNTENANCE THE DIRECT DEFIANCE OF ITS AUTHORITY BY THE GOVERNMENT AND THE COURTS BELOW?

A. Following the Government's Lead, The District Court Directly Defied the *Neder* Court's Instructions on the Scope of the Mail and Wire Fraud Statutes

On January 12, 2004, the Supreme Court denied Milton Sonneberg's ("Petitioner") petition for a writ of certiorari (Docket #03-752). In so doing, for the first time in available records, it sent the chilling message that lower courts may with impunity directly defy the express prior written opinion of the United States Supreme Court. The executive branch's deliberate disregard of the instructions in *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L. Ed. 2d 35 (1999) coupled with the lower courts' post–*Neder* decisions undermines the Constitutional system of checks and balances. The direct defiance of *Neder's* instructions overthrows the hallowed principle of *stare decisis*.

On March 1, 2000, Petitioner filed a 28 U.S.C. § 2255 Motion for collateral relief with the United States District Court for the District of New Jersey that had presided over Petitioner's conviction for conspiracy, mail and wire fraud, and interstate transportation of property obtained through fraud. The essence of the charges and the government's theory of prosecution was that Petitioner was guilty of fraudulent nondisclosures, primarily regarding a 1989 securities matter for which Petitioner, after six years, had not yet even been sentenced. Moreover, pursuant to the ruling ultimately made by the district court involved, the offense conduct that was undisclosed was literally "victimless" and Petitioner's role was in fact very minor.

The New Jersey conviction rested on the government's position, wholly adopted by the district court, that the mail and wire fraud statutes sweep more broadly than common law fraud. Therefore, went the theory, even absent a duty to disclose because no fiduciary or other trust relationship could be attributed to Petitioner, Petitioner was nonetheless guilty of fraud simply because he failed to disclose such information. Over Petitioner's objection Petitioner grounded on the well-established common law principle that one commits fraud by failing to disclose only when (s)he is under a duty to do so (*Chiarella v. United States*, 445 U.S. 222, 227-28, 100 S.Ct. 1108, 63 L. Ed. 2d 348 (1980)), the district court still insisted on instructing the jury that Petitioner's mere silence constituted grounds for conviction. On May 29, 1997, following the district court's instructions, not surprisingly the jury entered a general verdict of guilty.

Petitioner's § 2255 motion relied on the intervening decision of the Supreme Court in *Neder* which, in holding that materiality is an element of the mail and wire fraud statutes, explicitly instructed **courts** they **must presume** that when Congress enacted those statutes it intended for the settled meaning of the common law term "defraud" to apply. Despite Petitioner's citation thereto, nearly two years subsequent to the *Neder* opinion, denying Petitioner's 28 U.S.C. § 2255 Motion, the district court's letter opinion, *verbatim repeating the government's September, 2000 reply brief,* directly defied the Supreme Court, as follows:

Neder June 10, 1999	U.S.D.C. – April 6, 2001
The Government relies heavily on *Durland v. United States*, 161 U.S. 306 (1896), our first decision construing the mail fraud statute, to support its argument that the fraud statutes sweep more broadly than common-law fraud . . . Although *Durland* held that the mail fraud statute reaches conduct that would not have constituted "false pretenses" at common law, it did not hold, as the Government argues, that the statute encompasses more than common-law fraud.	As [the government] correctly points out, the mail and wire fraud statutes are not limited to matters which would be punishable as common law fraud. *See Durland v. United States*, 161 U.S. 306, 313-14 (1896) . . .

B. By Concurring With The Government's Deliberate Misstatement Of The Date Of The *Neder* Decision, The Court Of Appeals Fundamentally Erred On Whether *Neder* Constitutes An Intervening Change In The Law

Verifiably, the following is an exact copy of the heading of the *Neder* decision:

NEDER *v.* UNITED STATES

Certiorari To The United States Court Of Appeals For The Eleventh Circuit

No. 97-1985. Argued February 23, 1999 – Decided June 10, 1999

Beyond its endorsement of the district court's defiance of the Supreme Court, and despite Petitioner's spotlighting of the government's misstatement of the *Neder* decision's date, the United States Court of Appeals for the Third Circuit adopted in whole the government's misrepresentation of the date. Specifically, it held: "*In fact*, **Neder** *was decided on February 23, 1999* (emphasis added), and the [Supreme] Court denied his petition March 5, 1999, ...[therefore] the **Neder** decision was not 'intervening'."

Plainly, contrary to the Third Circuit and the government, **the date wrongfully adopted from the government's brief was the date of oral argument in *Neder*, not the date *Neder* was decided.** Since March 5, 1999 ineluctably precedes June 10, 1999, it is incontrovertible that *Neder* was indeed intervening. The Third Circuit could not have had it more wrong.

C. Denial Of The Petition Ratifies A Gross Miscarriage Of Justice And Enshrines Lasting Public Disrespect For This Court's Supremacy As The Highest Court In The Land

The Third Circuit established a limitless scope for prosecution under the Federal fraud statutes. Its holding is inconsistent with the holdings of this Court and other circuit courts. This combination of egregious errors directly

deprived Petitioner of his constitutional right to a fair trial as well as objective appellate review. The record facts and the law supporting Petitioner's arguments on this issue are found in his petition for a writ of certiorari.

Despite having been convicted for conduct that this Honorable Court has otherwise determined is not criminal, Petitioner has already served a prison sentence of nearly six years plus a year of supervised release. Petitioner remains under the supervision of the United States Probation Office. Under the terms of his sentence, Petitioner is subject to that status for an additional four years. Only a rehearing stands between the permanent, public enshrinement of the acceptability of direct defiance of this Court by the government and the courts below, not to mention the perpetuation of a gross miscarriage of justice in the ongoing violation of Petitioner's constitutional rights.

Dated: February 3, 2004

Respectfully submitted,

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CERTIFICATION

I, Milton Sonneberg, Petitioner, *pro se*, hereby certify in good faith that due to a unique circumstance a rehearing by this Honorable Court is warranted for my petition for a writ of certiorari. It took the denial of the petition for this singularly historic circumstance to unfold. The substantial ground not previously presented is that for the first time on the available record this Honorable Court's failure to grant the writ must inevitably result in the public enshrinement of direct defiance by courts below of the express written authority of this Court. This Court, by failing to grant certiorari here, ratifies the wholesale flouting by the courts below and the federal government of this Court's supremacy as the final word on questions of statutory construction. Commensurately, tolerance of the defiance of this Court's instructions by the government and the courts below in this matter foreshadows a collapse of the entire constitutional system of checks and balances along with the sacred judicial principle of *stare decisis*.

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